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March 9, 2011

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, N.W.  
Washington, D.C. 20423

RE: Finance Docket No. 35459, V&S Railway, LLC – Petition for Declaratory Order –  
Railroad Operations in Hutchinson, KS

Dear Ms. Brown:

This letter is filed on behalf of the Association of Railway Museums, Inc. and the Tourist Railroad Association, Inc. (collectively "ARM/TRAIN"). It is in response to the Board's decision served February 17, 2011, which adopted a procedural schedule for this proceeding and granted ARM/TRAIN's earlier petition to intervene in it.

We have already replied to V&S Railway's (VSR) Petition for Declaratory Order in our January 18, 2011 filing. As stated in that filing, our interest in this proceeding is limited to VSR's apparent assertion in its petition that private rail operations could not be conducted over common carrier rail trackage, a position which could call into question the status of non-common carrier tourist, historic and excursion rail operations (collectively referred to as "tourist" operations) on commercial rail trackage. We pointed out in our January 18 reply that there was no basis in ICC or Board precedent for such a position. VSR now appears to agree (at least as to "consensual" operations). In its February 7 reply to our January 18 filing, VSR acknowledges that there is nothing in the precedent cited in its petition which gives any indication that the Board would find improper the consensual operations of a private carrier on the tracks of a rail carrier (VSR February 7 Reply at 5). Indeed, VSR itself points out that the Board has previously held that such operations are "in the nature of private carriage", beyond the Board's jurisdiction (Id., citing STB Finance Docket No. 34013, S.D. Warren Company – Acquisition & Operation Exemption – Maine Central R. Co. et. al., (served September 20, 2002)).

Accordingly, there appears to be no reason for ARM/TRAIN to submit any additional argument as to this issue.

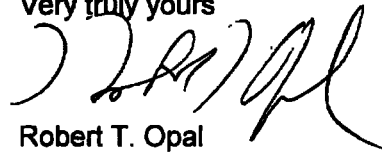
Additionally, while it does not appear to be relevant to any of the issues in this proceeding, we will briefly comment on VSR's discussion of the "compensation" tourist railroads receive for the services they perform (VSR February 7 Reply, p 4). It is not entirely clear why VSR raised this

point, but they may be suggesting that, since tourist railroads receive "compensation" for their services, they are somehow potentially subject to STB jurisdiction.

This is not an issue the Board need address in this proceeding. However, "compensation," as such, is not the touchstone for determining the STB regulatory status of a rail operation. An entity conducting rail operations – whether or not subject to STB jurisdiction - will nearly always receive "compensation" for those operations in some form. As VSR notes, tourist railroads normally receive "compensation" for the services they perform (typically in the form of charges for train rides, or admission fees which include train rides). But contractors who perform private rail freight services also receive "compensation" for their services. It is, in fact, very common for private and industrial "plant" railroads to be operated by contractors. For example, in the S. D. Warren decision previously discussed, the Board noted that the private services would be conducted by a "third party contractor" (Decision at 1, fn 2). Obviously, the contractor would be compensated for those services.

STB only has jurisdiction over "rail carriers" as defined in STB's governing statute. Under 49 U.S.C. 10102(5), a "rail carrier" is defined as "...a person providing **common carrier railroad transportation** for compensation..." Regardless of whether they receive "compensation", tourist railroads typically do not perform, or hold themselves out to perform, "common carrier railroad transportation" – they give demonstration train rides.<sup>1</sup> Most of them are seasonal operations (some operate only on weekends). Some operate as tenants on general railroad system trackage. Others operate entirely on their own trackage which is not part of the general railroad system. From the standpoint of the services tourist railroads perform, they are no more "common carriers" than amusement park railroads which use restored railroad equipment.<sup>2</sup>

Very truly yours



Robert T. Opal  
Attorney for:  
Association of Railway Museums, Inc.  
Tourist Railway Association, Inc.

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<sup>1</sup> FRA defines "tourist, scenic, historic, or excursion operations" to mean "railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose...", 49 CFR 238.5. FRA regulates "tourist" operations on the general system, and non-general system tourist operations which are "non-insular" (see the portion of 49 CFR Part 209, App A entitled "The Extent and Exercise of FRA's Safety Jurisdiction" for a more detailed description of FRA's treatment of "tourist" railroads). Unlike STB, FRA's jurisdiction over "railroads" is not limited to "common carriers", see 49 U.S.C. 20102(1) and (2) (definitions of "railroad" and "railroad carrier" under Federal Railroad Safety Act). See also Amendments to Railroad Safety Programs, 54 Fed. Reg. 33227, August 14, 1989 (discussing 1988 statutory changes removing "common carrier" limitation on FRA jurisdiction under pre-FRA safety laws).

<sup>2</sup> For example, Disney World in Orlando, FL, and Cedar Point Amusement Park in Sandusky, OH both operate amusement park railroads with restored steam locomotives previously used in commercial rail service. While they receive "compensation" for these train rides (the rides are included in the park admission fee), they are clearly not providing "common carrier railroad transportation."

## CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon the following:

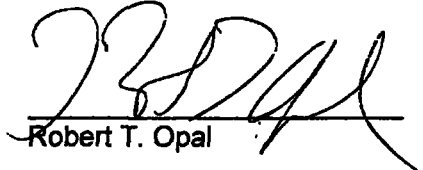
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Dated at Glen Ellyn, Illinois this 9th day of March, 2011

  
Robert T. Opal



# Surface Transportation Board

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Docket #: **FD\_35459\_0**

Case Title: **V & S RAILWAY, LLC--PETITION FOR DECLARATORY ORDER--RAILROAD OPERATIONS IN HUTCHISON, KAN.  
5 Service List entries found.**

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